No. 1285

In the Supreme Court of the United States

OCTOBER TERM, 1946

MARIANNA VON MOLTKE, PETITIONER

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 170–174) is not reported. The majority and dissenting opinions in the circuit court of appeals (R. 182–198) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 10, 1947 (R. 181). The petition for a writ of certiorari was filed April 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence is sufficient to sustain the finding of the district court in the habeas corpus hearing that petitioner freely, intelligently, and knowingly waived her constitutional right to the assistance of counsel and pleaded guilty.

STATEMENT

On September 17, 1943 (see R. 17), an indictment was filed in the District Court for the Eastern District of Michigan charging that petitioner and others conspired to transmit to the German Reich materials and information relating to the national defense of the United States with the intent that they be used to the injury of the United States, and to collect and publish information in respect of the movement and disposition of the armed forces, ships, aircraft, and war materials of the United States with intent to communicate such information to the German Reich, in violation of Sections 2 and 4 of the Espionage Act of June 15, 1917, Title I, c. 30, 40 Stat. 217 (50 U. S. C. 32, 34). Forty-seven overt acts were alleged, of which five (Nos. 24, 29–32) concerned petitioner. Four of these five (Nos. 24, 30–32) charged that petitioner met and conferred with one or more of the other defendants on designated dates; the other (No. 29) charged that petitioner introduced one Arndt to another defendant. Each overt act was specifically alleged to have been committed "in pur-

suance of said conspiracy and to effect the object and purpose thereof." (R. 20–34.)

Petitioner was arraigned on September 21, 1943; on the advice of an attorney appointed by the court for the purposes of arraignment only, she stood mute, and a plea of not guilty was entered on her behalf (R. 10–12, 47, 110–113). On October 7, 1943, petitioner signed a waiver of her right to counsel (R. 36), withdrew her plea of not guilty, and entered a plea of guilty (R. 159–160).

On August 7, 1944, petitioner, through counsel, moved for leave to withdraw her plea of guilty on the grounds that it was made without knowledge of her legal rights and understanding of the nature of the offense charged, and that the acceptance of the plea by the court when she was without counsel violated her right to counsel under the Sixth Amendment (R. 37). Following a hearing,[1] the motion was denied by Judge Moinet, who found that petitioner was properly advised of her constitutional rights by the court both prior to and at the time she entered her plea of guilty, that the plea was submitted after due and careful deliberation, that petitioner was advised of and thoroughly understood the nature of the charge contained in the indictment, that the plea was not due to any promises or misrepre-

[1] The present record does not contain the proceedings at this hearing. It is stated in the petition for a writ of certiorari that no testimony was taken at the hearing (Pet. 12).

sentations, and that the motion for leave to withdraw the plea was not filed within the ten-day period prescribed by Rule 2 (4) of the Criminal Appeals Rules (18 U. S. C., following § 688), which were then in effect (R. 46–47).

On November 15, 1944, petitioner was convicted on her plea of guilty and sentenced to imprisonment for four years. (R. 8–9). So far as the record indicates, no appeal was taken.

On February 7, 1946, petitioner filed in the convicting court a petition for a writ of habeas corpus, alleging that her imprisonment was illegal in that she had been denied the assistance of counsel for her defense and had been coerced, intimidated, and deceived into pleading guilty, in violation of her constitutional rights (R. 1–7). The writ issued (R. 15–16) and a hearing was held (R. 47–170). The district court (Judge O'Brien) found not only that petitioner, "an intelligent, mentally acute woman" (R. 174), who was "obviously of good education and above the average in intelligence" and who had a "fluent and ample" knowledge of English (R. 171), had failed to sustain the allegations of the petition by a preponderance of the evidence, but that the overwhelming weight of the evidence showed that she had freely, intelligently, and knowingly waived her constitutional rights (R. 170–174). The writ was accordingly dismissed, and petitioner was remanded to the respondent's custody (R. 175). On appeal to the Circuit Court of

Appeals for the Sixth Circuit, the judgment of the district court was affirmed (R. 181), one judge dissenting (R. 189–198).

Petitioner testified at the hearing on the writ as follows: She was arrested on August 24, 1943, on a Presidential warrant as a dangerous enemy alien (R. 48, 50). She was living in Detroit at the time with her husband, an instructor in German at Wayne University, and two of her three children, one of whom was suffering from diabetes (R. 48, 59). At some time following her arrest, her husband was suspended from his $4,000-per-annum teaching position and later got a job paying $35 per week (R. 168). In addition to her household duties, petitioner was a member of the Red Cross and a local Parent-Teachers Association, engaged in social work at a Y. W. C. A. International Center, and participated in such voluntary work as gasoline and sugar rationing (R. 89–90). Following her arrest, she was questioned from August 24 to August 27 by two agents of the Federal Bureau of Investigation, both of whom were courteous and friendly to her (R. 49). On September 18, 1943, a copy of the indictment involved herein (see *supra*, p. 2) was handed to her; she read it, but did not understand it (R. 50). On September 21, 1943, she was taken before Judge Moinet to be arraigned; she was advised by the judge that she was entitled to counsel; she stated that she had no money, and the judge said he would appoint counsel for her. A lawyer who

was in the courtroom was appointed as her attorney for the purposes of arraignment only; the lawyer did not see the indictment, but merely asked her how she wished to plead, to which she replied, "Not guilty"; on the lawyer's advice, she stood mute when arraigned, and a plea of not guilty was entered for her.[2] The judge then told her that he "would appoint an attorney right away," from which she understood that "the gentleman was to be expected to come right away"; she was then taken to Wayne County Jail. (R. 51–53.)

Between September 23 and October 7, 1943, the date on which she pleaded guilty, petitioner further testified, agents Kirby, Dunham, Hanaway, and Collard of the F. B. I. came daily to the cell block where she and two female codefendants were incarcerated (R. 53). The agents and the three defendants would engage in "conversations and discussions" concerning "things of interest," such as "hostile publicity, and sentiment, and cost of the trial, and the inquisition of the Federal Judge" (R. 53–54). On one or more of these

[2] Archie Katcher, the attorney appointed by Judge Moinet to represent petitioner at her arraignment, testified that he talked to petitioner in a whispered conversation for a few minutes; that he asked her and a codefendant whom he was also representing, "both at once, whether they understood what this was all about"; that one of them said she did understand, and the other indicated that she too understood; that both indicated they felt they were not guilty; and that he advised them to stand mute when arraigned (R. 110–113).

occasions, petitioner asked Dunham, "Is it really so bad, that the public is so hostile?"; "* * * if we go to Court, will we be bodily attacked?" Dunham would reply, "It is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected." This left her with "the thought that it is terrible to go to court and face a hostile public." (R. 82–83.)[3] On another such occasion, petitioner heard Kirby tell Mrs. Behrens, a codefendant who had pleaded guilty, that "the other defendants" in the case would plead guilty the following week; petitioner asked Kirby whether, if the other defendants pleaded guilty, she would "get a trial for myself;" Kirby replied that he "could not answer this question because he did not know if this would be all right with the prosecuting attorney" (R. 85).[4]

Petitioner also testified that on September 25, 1943, two attorneys conferred with her at the request of her husband for some two and one-half hours (R. 56, 92). One of the attorneys, Okrent, "inquired was I to have counsel," and she

[3] Dunham denied that he ever advised or suggested to petitioner that "public feeling was running high" in connection with the case (R. 154).

[4] Kirby testified that when petitioner asked him about her right to a trial in the event the other defendants pleaded guilty, he replied that "the question of the trial would be up to the United States Attorney's office," and might also have stated that he "knew of no reason why she should not be tried without the others" (R. 134–135).

replied that Judge Moinet was going to appoint counsel for her (R. 93). She talked only to Okrent; the other attorney, Berger, "was just sitting there" (R. 92). She at no time asked the attorneys anything about her case (R. 95); the discussion was exclusively concerned with her family affairs (R. 93).[5]

On or about September 27, 1943 (R. 56), petitioner further testified, she summoned agent Collard for the purpose of obtaining from him "some information as to the indictment. I didn't understand that." Up to that time she had received no advice concerning the indictment. She told Collard that "he has taken my statement and he knew that * * * I didn't do those

[5] Berger testified that, though Okrent "did most of the talking," he also talked to petitioner (R. 114), and, it would appear, quite extensively. He interrogated petitioner as to the charges that had been made against her (R. 114); he would read to petitioner parts of the indictment referring to her, and put her through "a form of cross-examination" (R. 119); the purpose of the interview was to discuss "this case" with her, and not family matters primarily (R. 118); petitioner talked about her family affairs, such as how her husband "was getting along, and whether he would be reinstated," etc. (R. 117), but also talked "About this case, about the indictment, or the conspiracy under the Espionage Act. We wanted to know the whole story, and I presume she told us" (R. 115); the "question of pleading guilty came up" and Berger told her "if you are guilty, plead guilty; and if you are not, do not" (R. 120). The attorneys made it clear, however, that they were not acting as attorneys, but merely as friends of petitioner's husband (R. 116).

things which are called 'Over' Acts." (R. 54–55, 69.) Collard told her that the indictment did not "cover the charge" (R. 55), that it did not "mean much of anything" (R. 76), that "those charges don't mean a thing" (R. 77). He then explained the indictment to her "by an example which he called the 'Rum Runners,'" and which she understood as follows: "* * * if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still * * * this plan is carried out, in the law the man who was present * * * nevertheless is guilty of conspiracy." She then told Collard, "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" Collard then explained about the "Probation Department" and its functions. (R. 55.) Petitioner believed that Collard was qualified to explain the indictment to her because she knew he was a lawyer (R. 56).[6]

[6] Collard, an attorney who had practiced law (R. 140), testified that at petitioner's request, he spent several hours discussing the indictment with her (R. 139–140, 141); that he attempted to explain the nature of a conspiracy to the best of his ability (R. 142); that he could not recall petitioner's asking him to explain the meanings of "feloniously" and "overt act," but that if she did, he probably tried to explain them (R. 143–144); that he was unable to recall his use of any "rum runner" illustration, though he might have used

As a result, apparently, of something told her by Mrs. Behrens, the codefendant who pleaded guilty, petitioner began to fear, she further testified, that if she did not "fall in line and plead guilty," her husband would be implicated, as well as herself (R. 60–62). She asked Collard if that was true, and Collard said that "he couldn't answer that question" (R. 61). On September 28, 1943, she said to agent Hanaway, "As the matter stands, and as I understand the situation, I am supposed to plead guilty"; she told him she was "willing to cooperate,"[7] but wanted assurance from Assistant United States Attorney Babcock, who was handling the prosecution, of three things—that the publicity concerning the case would be stopped immediately, that she would be incarcerated, if at all, in an institution near Detroit, and that she would never be deported. Hanaway agreed to convey her message to Babcock. Later the same day, petitioner was taken to the marshal's office, where she conferred with Babcock. She told Babcock that she understood "the situation" and knew that he wanted her to plead guilty; that if she pleaded guilty, it was

such an illustration (R. 142–143); that it was possible that petitioner asked him whether "merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal," but he could not recall such a question (R. 144).

[7] Hanaway testified that he had no recollection of petitioner's ever having said that she was pleading guilty because she wanted to cooperate (R. 123, 124).

only "to cooperate," and not because she was guilty, which she was not.[8] She then repeated her three "conditions" to Babcock. (R. 58–59.) Because, however, "the answer Mr. Babcock gave me was not fully satisfactory,"[9] and because she was advised by her husband, in a conference with him at about the same time as her visit with Babcock, not to do anything without consulting a lawyer, petitioner decided not to plead guilty that day, and told Babcock that she wanted "to think the whole situation over" (R. 60, 103–104).

Notwithstanding her husband's advice, petitioner further testified, she did not consult a lawyer (R. 65). After further reflection, she finally made up her mind to plead guilty even though she knew she was innocent (R. 64). Accordingly, on October 7, 1943, she talked to Babcock again and told him she was ready to plead guilty. She repeated to him that her plea would be made notwithstanding her knowledge of inno-

[8] Babcock testified that petitioner at no time stated to him that she wished to plead guilty in order to cooperate, or that she wanted to plead guilty even though she was not guilty (R. 159).

[9] Babcock testified that he made it very clear to petitioner that he had no control over the publicity connected with the case, her place of incarceration if she pleaded guilty, or the matter of her possible deportation, and could therefore give her no assurance whatever in respect of the three "conditions" she sought to attach to her proffered plea of guilty (R. 158–159, 163–164). Hanaway also testified that Babcock made this clear to petitioner (R. 123, 124–125).

cence.[10] Babcock accordingly took her before Judge Lederle because Judge Moinet was not in court that day. (R. 65.) Judge Lederle asked her if the indictment had been explained to her, and she replied in the affirmative, though it had not been (R. 67–68). According to her testimony, he also asked her if she was pleading guilty because she felt she was guilty, and she said, "Yes," though this was not true (R. 68). A "note" was handed to her to sign; at first she objected to signing it because it mentioned something about a trial, which she did not want; Babcock told her it was all right to sign it, however, so she did (R. 66–67).[11] Judge Lederle then accepted her plea of guilty (R. 72). In a conversation with agents Dunham and Kirby shortly after pleading guilty,

[10] Babcock specifically contradicated this testimony of petitioner (see note 8, *supra*, p. 11). Collard, who was present at this second interview between Babcock and petitioner, testified that he was "absolutely positive" that petitioner did not state, either to Babcock or to himself, that she wanted to plead guilty even though she was not guilty, or in order to cooperate with the Government, but, on the contrary, that she stated she wanted to plead guilty because she was guilty (R. 138).

[11] This "note" was a formal waiver of her right to counsel (see R. 36). Babcock testified that Judge Lederle "was extremely careful and meticulous to make sure, as he always does, that [petitioner] understood what she was doing." He further testified that the judge "interrogated her as to whether she wished to have counsel represent her and advised her as to signing a waiver of that right. * * * I wish to say again that I have no distinct recollection now—let me put it this way: if any of our Judges have missed doing that, I would have remembered that very distinctly." (R. 166.)

petitioner told them "even then" that she "should not have pled guilty"; that she "had done the wrong thing in pleading guilty" because she was not guilty (R. 72–73).[12]

"Around Christmas," 1943, petitioner further testified, she learned that it was permissible for a defendant to withdraw a plea of guilty (R. 73).[13] Shortly after Christmas, she learned for the first time from Okrent, one of the attorneys who visited her in jail (*supra*, pp. 7–8), and who eventually represented her in her motion to withdraw her plea of guilty (see R. 37), of a defendant's presumption of innocence and of the fact that, contrary to her prior understanding, a defendant who pleads guilty may not appeal his case (R. 73).

On cross-examination, petitioner testified that after having read the indictment, she definitely felt that she was innocent of the charges contained in it, though she did not know what those charges were (R. 90–91). She admitted that she repeatedly asked the F. B. I. agents for advice as to how to plead, because "There was nobody else I could ask." She denied that the agents ever told her to consult her attorney.[14] She denied that she

[12] Kirby contradicted this testimony of petitioner (R. 133). Dunham was not questioned concerning this alleged statement of petitioner.

[13] Petitioner's motion for leave to withdraw her plea of guilty was filed August 7, 1944 (*supra*, p. 3).

[14] Dunham (R. 147, 153), Hanaway (R. 128–129), and Kirby (R. 131–132) all testified that they advised petitioner to consult counsel about her case.

ever told the agents that she did not want an attorney.[15] She denied that she ever told the agents that she did not want the attorney her husband had sent. (R. 96.)[16] She denied that she ever told the agents that she had had arguments with her husband regarding the matter of retaining an attorney (R. 98).[17] She denied that Babcock ever told her that she should not plead guilty in reliance on any of the three "conditions" she had expressed to him.[18] Asked if she did not know, from the fact that her husband told her she should not plead guilty before consulting an attorney, th t she was entitled to a lawyer before pleading

[15] Kirby testified that when he told petitioner she should consult an attorney, she "jerked her shoulders, and said she was not interested; that she wanted to make up her own mind" (R. 132). Collard testified that on more than one occasion petitioner told him she did not want an attorney (R. 137). Dunham testified that petitioner told him that her husband "was very determined she should have an attorney," but that she felt that the problem of whether to plead guilty or not "was a problem she wanted to decide herself" (R. 148; see also R. 153).

[16] Dunham contradicted this testimony of petitioner (R. 148, 153).

[17] Dunham testified that petitioner told him that her visits with her husband were "unpleasant" because he kept insisting she retain counsel (R. 148).

[18] Babcock testified that he told petitioner that under no circumstances should she plead guilty in reliance on anything he might say concerning the conditions on which she wished to plead guilty, and that she would have to make her decision with respect to her plea "on the basis of whether or not in her own conscience she had to say that she was guilty" (R. 159).

guilty if she wished one, she replied that she did not (R. 103). She denied knowing that she did not have to plead guilty if she did not want to (R. 103, 105–106). She admitted that, after her husband persuaded her, on the occasion of her visit with Babcock, not to plead guilty before seeing a lawyer, she thereafter made the decision to "disregard the advice that your husband had given you" and "plead guilty instead" (R. 103–104). She maintained that she told Babcock that she wished to plead guilty "Though I know I am not guilty," but only "To cooperate, to fall in line, to get it over with,"[10] though she admitted that no one had requested her to do that (R. 105).

All four of the F. B. I. agents concerned testified, on behalf of the respondent, that they made no promises of any kind to induce petitioner to plead guilty (R. 121, 131, 136, 147), and never advised her to plead guilty (R. 122, 124, 131, 137, 147, 151, 153). All testified that petitioner kept trying to induce them to advise her whether to plead guilty or not, but they told her that that was a matter for her or her attorney to decide (R. 121, 128–129, 131–132, 135, 137, 140, 148, 152, 153). Hanaway testified that he told petitioner that "if she felt that she were innocent in her heart she should under no circumstances plead guilty" (R. 122).

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[10] See note 8, *supra*, p. 11.

Collard testified that at the time he acceded to petitioner's request that he explain the indictment to her she had a copy of the indictment, had read it, and had the paragraphs pertaining to her circled or otherwise marked (R. 140, 142). He further testified that he believed that petitioner's plea of guilty was made "after due consideration with a full and complete understanding of the charge made against her" (R. 146; see also R. 147).

Babcock testified that he cautioned petitioner that her decision whether to plead guilty or not should depend solely on her feeling of guilt or innocence; that he would never have taken her to court to enter a plea of guilty if she had told him she wished to plead guilty notwithstanding her innocence; that Judge Lederle accepted her plea of guilty only after proceeding "in the normal way"; that the "normal way" was for the judge to ask the defendant if it was true that he wished to plead guilty, if the plea was being tendered by reason of any promises or threats made to him, if the plea was being made because the defendant was guilty, and if the defendant had counsel or desired appointed counsel; and that only upon his receiving satisfactory answers to these questions would the judge accept a plea of guilty (R. 159–160). Other pertinent testimony by Babcock and the F. B. I. agents is set out in footnotes 3–4, 6–12, 14–18, *supra*.

ARGUMENT

The only issue in this case is whether the district judge was warranted in finding (R. 174) that petitioner freely, intelligently, and knowingly waived her constitutional rights to the assistance of counsel and, by her plea of guilty, to a trial by jury. Whether or not petitioner did so waive her rights presented purely a question of credibility of witnesses, which the district judge resolved against petitioner. We submit that he was clearly correct in doing so.

(a) *Whether petitioner intelligently waived her right to counsel.*—Petitioner maintained at the hearing below that she was unaware of her right to counsel (*supra,* pp. 14–15), which the record of the convicting court shows she intelligently waived (R. 36). We submit, however, that from the evidence adduced, including petitioner's own admissions, her statement in this respect is inherently incredible. Nothing in the dissenting opinion below, moreover, suggests that petitioner may have been unaware of this right. The evidence we have summarized in the Statement, *supra,* clearly established that petitioner, an intelligent, mentally acute woman of good education, who had led a fairly active social life, was fully cognizant of her right to be represented by counsel. She was advised of that right by the court on the occasion of her original arraignment, and an attorney was in fact appointed to represent her and did repre-

sent her, though for the purposes of the arraignment only. By her own admission, she was told by the court that another lawyer would be appointed to represent her in subsequent proceedings. While no other attorney ever did represent her, this was because she thereafter decided she did not desire counsel and she so advised the court when, two weeks after her original arraignment and entry of a plea of not guilty, she formally waived her right to counsel and changed her plea to guilty. Between the time of her original arraignment and her change of plea, her husband made every effort to induce her to retain counsel. He even sent two attorneys to visit her and talk to her about the case. While they told her they were there as friends of her husband and not as attorneys, she herself admitted that they asked her whether she planned to retain counsel and that she explained to them that counsel was to be appointed for her. The F. B. I. agents on numerous occasions likewise advised her to engage counsel. Notwithstanding her testimony that she was waiting for the lawyer whom the court promised to appoint for her (see R. 103), however, her statements and conduct clearly indicated that she not only was not anxious for the promised attorney to come, but that she forcefully repudiated the idea of counsel both to her husband and to the F. B. I. agents. She even became incensed at her husband's insistent attitude on the matter. The evidence showed that

the only decision she was having difficulty in making was whether to plead guilty or not; and on this she wanted to make up her own mind. The only considerations which she deemed important in making this decision were her chances, if she pleaded guilty, of never being deported, of being incarcerated in an institution close to her home in the event she was sentenced to imprisonment, and of securing an end to the unfavorable publicity which had attached to the case and which was adversely affecting her husband's employment and standing in the community. She sought to secure some sort of guarantee from the prosecuting attorney that these three "conditions" would be fulfilled if she pleaded guilty, but he, of course, could not and did not make any such guarantee. Nevertheless, she decided after further deliberation to plead guilty anyway, and to take her chances on the realization of her desires in the matter. She then announced her decision to the prosecuting attorney, who satisfied himself that she wished to plead guilty because she felt that she was guilty. The prosecuting attorney then brought her before Judge Lederle to effect the change of plea. The judge accepted her plea of guilty only after satisfying himself by careful questioning that the plea was not the result of threats or promises but of a sense of guilt, and that, with knowledge of her right to counsel, petitioner voluntarily waived that right.

Petitioner's testimony (*supra*, p. 13) that she was not aware, when she pleaded guilty of the presumption of innocence enjoyed by defendants in American courts and did not learn of it until two or three months thereafter is, we submit, without special significance in this case. Advice regarding this presumption is but one of the many kinds of advice a lawyer may be expected to give his client, and the evidence overwhelmingly established that petitioner freely and intelligently waived her right to counsel. The right of the Government and the courts to rely on a free and intelligent waiver of the right to counsel would obviously be illusory if every defendant who made such a waiver and was thereafter convicted, whether on a plea of guilty or otherwise, could then revoke his waiver and secure a new trial on the ground that he would have adopted different tactics if he had known something that an attorney might have told him. See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275–281. It is not without significance, moreover, that, even according to her own testimony, some eight months elapsed between the time petitioner learned of the presumption of innocence and of the possibility of withdrawing a plea of guilty, and her filing of the motion for leave to withdraw her plea (see pp. 3, 13, *supra*).

(b) *Whether petitioner intelligently pleaded guilty.*—The dissenting judge below did not ques-

tion that petitioner, with knowledge of her right to counsel, freely waived the right. Rather, the sole basis of his dissent was his belief that the record established that an agent of the F. B. I., in all honesty, but erroneously, advised petitioner that she was guilty of conspiracy if she merely conferred with people who later turned out to be criminals, that in reliance on the truth of this advice petitioner felt her case was hopeless, and that, believing that the retention of counsel would be superfluous under the circumstances, she decided to plead guilty without the advice of counsel (see R. 197). It was only because he believed the record established the giving of this misleading advice that he felt petitioner "did not competently and intelligently waive her right to counsel" and did not intelligently plead guilty (*ibid.*). The only evidence in the record, however, that an F. B. I. agent gave petitioner this erroneous advice is her own statement to that effect, which the district judge certainly was not required to, and evidently did not, believe. Petitioner gained her erroneous impression of what was required to make one a conspirator, she testified, from the agent's explanation of the indictment by the use of a hypothetical illustration involving "rum runrunners," in which an innocent person who associated with criminal conspirators became himself a criminal conspirator. Collard, the agent involved, did not admit that he ever misinformed

petitioner, however. In fact, he testified that he had no recollection of ever having used an illustration of conspiracy involving "rum runners," much less that he ever attempted to explain a conspiracy by any illustration in which one of the "conspirators" lacked the essential requirement of criminal intent. He admitted the possibility that he might have used an illustration involving "rum runners," but he certainly did not admit, as the dissenting judge seems to have assumed (see R. 194), that he might have given any such illustration in the manner attributed to him by petitioner—that is, in such a way as to indicate guilt of conspiracy by one innocent of all criminal intent. He testified that he attempted, at petitioner's behest, to explain to her the meaning of conspiracy to the best of his ability. He further restated his belief, expressed earlier in an affidavit opposing petitioner's motion to withdraw her plea of guilty (see R. 144–145), that petitioner's plea was her free and voluntary act made after due consideration "with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146–147). Such a statement would have been entirely inconsistent with any admission on his part that he gave petitioner misleading information. It strains credulity to believe that an F. B. I. agent, a qualified attorney who had practiced law, could

himself believe, and honestly[*] advise another, that a person could be guilty of a criminal conspiracy which was punishable by death (see 50 U. S. C. 32, 34) without any criminal intent or even knowledge of the existence of the conspiracy. It is even more incredible that he should have stated, as petitioner testified he stated (*supra*, p. 9), that the indictment which charged so serious a crime did not "mean much of anything," that "those charges don't mean a thing." The district judge, who heard and observed the witnesses, evidently did not believe that the agent had so misinformed petitioner, or at least that petitioner was misinformed, since he specifically found that she "understood the charge and the proceedings" (R. 174). And, we submit, he was amply warranted in refusing to believe petitioner's testimony that she was misled by misinformation as to the charge given her by the agent. As we have indicated in the Statement, *supra*, petitioner's testimony at the hearing was replete with self-serving statements which, in numerous particulars, were contradicted by Babcock, the F. B. I. agents, and Berger, and which, in other instances, were intrinsically incredible (see, particularly, petitioner's testimony on cross-examination, *supra*, pp. 13–15).

[*] There is no suggestion whatever that the explanation given by Collard to petitioner was not given with utter honesty and to the best of his ability. See the comments of the dissenting judge below at R. 194, 196, 197.

It is noteworthy, moreover, that petitioner's theory at the hearing was not that she had innocently done the acts of meeting and conferring (overt acts 24 (R. 29), 30–32 (R. 30–31)) and making an introduction (overt act 29 (R. 30)), but that she had not done the acts at all (see pp. 8–9, *supra;* see also R. 50, 64–65, 76–77). In view of this denial, it is utterly inconsistent to say, as she does, that she was misled into pleading guilty by a belief erroneously imparted to her by Collard that mere association with criminals makes oneself a criminal. Furthermore, petitioner admittedly read the entire indictment (*supra,* pp. 5, 13), and there was evidence that she had marked the paragraphs concerning her (*supra,* p. 16). It is difficult to believe that a "mentally acute" woman, "obviously of good education and above the average in intelligence," and having a "fluent and ample" command of English (R. 171, 174; see also R. 183), could read the overt acts without observing and perceiving some significance in the qualifying words repeated in each—"in pursuance of said conspiracy and to effect the object thereof." The nature of the conspiracy thus referred to was set forth in detail in the first part of the indictment, which, of course, also mentioned petitioner by name. It would take very little knowledge of English indeed to read and understand, at least generally, the nature of the charge and its gravity.

The record of the convicting court shows that petitioner, having been advised of her right to counsel, voluntarily and intelligently waived her right and pleaded guilty. The presumption of regularity which attaches to a judicial judgment is not lightly to be rebutted on collateral attack. *Johnson* v. *Zerbst*, 304 U. S. 458, 468–469. Petitioner had a full and fair hearing of her contention that she did not knowingly and intelligently waive counsel and plead guilty. The issue presented to the district judge was fundamentally one of accepting or rejecting petitioner's testimony in respect of whether she knew of her right to counsel when she waived it and of the nature of the charge to which she pleaded guilty. The district judge, who observed petitioner's demeanor, rejected her testimony in these respects. We submit that he was clearly justified in so doing, as the record establishes, if the government witnesses were entitled to any credence at all, that petitioner was not above misstating the facts whenever it was to her advantage to do so.[21]

[21] While the doctrine of *res judicata* does not, properly speaking, apply in a habeas corpus proceeding (*Salinger* v. *Loisel*, 265 U. S. 224, 230), and the district judge below based his findings solely on the evidence adduced at the habeas corpus hearing, it may be observed that another judge of the same court made substantially the same findings in denying petitioner's motion for leave to withdraw her plea of guilty based on the same contention (*supra*, pp. 3–4), and that no appeal was taken from the order of denial or the judgment of conviction.

CONCLUSION

The judgment below is correct, and turns on the credibility of witnesses heard by the trial judge. There is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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